

H. B. 2114

(By Delegates Caputo and Martin)
[Introduced January 12, 2011; referred to the
Committee on Energy, Industry and Labor, Economic
Development and Small Business then the Judiciary.]

A BILL to amend and reenact §21-5C-3 of the Code of West Virginia,
1931, as amended, relating to maximum hours of work; and
providing that an employee has the right to decline to work
more than forty hours in any one workweek.

Be it enacted by the Legislature of West Virginia:

That §21-5C-3 of the Code of West Virginia, 1931, as amended,
be amended and reenacted to read as follows:

**ARTICLE 5C. MINIMUM WAGE AND MAXIMUM HOURS STANDARDS FOR
EMPLOYEES.**

§21-5C-3. Maximum hours; overtime compensation.

(a) ~~On and after the first day of July, one thousand nine~~
~~hundred eighty,~~ No employer ~~shall~~ may employ any of his or her
employees for a workweek longer than forty hours, unless ~~such~~
~~employee receives~~ those employees receive compensation for his
their employment in excess of the hours above specified at a rate

1 of not less than one and one-half times the regular rate at which
2 ~~he is~~ they are employed. An employee has the right to decline to
3 work longer than forty hours in any workweek.

4 (b) As used in this section the "regular rate" at which an
5 employee is employed ~~shall be deemed to include~~ includes all
6 remuneration for employment paid to, or on behalf of, the employee,
7 but ~~shall not be deemed to~~ does not include:

8 (1) Sums paid as gifts; payments in the nature of gifts made
9 at Christmas time or on other special occasions, as a reward for
10 service, the amounts of which are not measured by or dependent on
11 hours worked, production or efficiency;

12 (2) Payments made for occasional periods when no work is
13 performed due to vacation, holiday, illness, failure of the
14 employer to provide sufficient work, or other similar cause;
15 reasonable payments for traveling expenses, or other expenses,
16 incurred by an employee in the furtherance of his or her employer's
17 interests and properly reimbursable by the employer, and other
18 similar payments to an employee which are not made as compensation
19 for his or her hours of employment;

20 (3) Sums paid in recognition of services performed during a
21 given period if either: ~~(a)~~ (A) Both the fact that payment is to
22 be made and the amount of the payment are determined at the sole
23 discretion of the employer at or near the end of the period and not
24 pursuant to any prior contract, agreement or promise causing the

1 employee to expect such payments regularly; or ~~(b)~~ (B) the payments
2 are made pursuant to a bona fide profit-sharing plan or trust or
3 bona fide thrift or savings plan, meeting the requirements of the
4 commissioner set forth in appropriate regulation which he or she
5 shall issue, having due regard among other relevant factors, to the
6 extent to which the amounts paid to the employee are determined
7 without regard to hours of work, production or efficiency; or ~~(c)~~
8 (C) the payments are talent fees (as such talent fees are defined
9 and delimited by ~~regulations~~ rules of the commissioner) paid to
10 performers, including announcers, on radio and television programs;

11 (4) Contributions irrevocably made by an employer to a trustee
12 or third person pursuant to a bona fide plan for providing old-age,
13 retirement, life, accident, or health insurance or similar benefits
14 for employees;

15 (5) Extra compensation provided by a premium rate paid for
16 certain hours worked by the employee in any day or workweek because
17 such hours are hours worked in excess of eight in a day or in
18 excess of the maximum workweek applicable to ~~such~~ the employee
19 under subsection (a) of this section or in excess of the employee's
20 normal working hours or regular working hours, as the case may be;

21 (6) Extra compensation provided by a premium rate paid for
22 work by the employee on Saturdays, Sundays, holidays or regular
23 days of rest, or on the sixth or seventh day of the workweek, where
24 ~~such~~ the premium rate is not less than one and one-half times the

1 rate established in good faith for like work performed in
2 nonovertime hours on other days; or

3 (7) Extra compensation provided by a premium rate paid to the
4 employee, in pursuance of an applicable employment contract or
5 collective bargaining agreement, for work outside of the hours
6 established in good faith by the contract or agreement as the
7 basic, normal or regular workweek where ~~such~~ the premium rate is
8 not less than one and one-half times the rate established in good
9 faith by the contract or agreement for like work performed during
10 ~~such~~ the workweek.

11 (c) ~~No~~ An employer ~~shall be deemed to have violated~~ does not
12 violate subsection (a) of this section by employing any employee
13 for a workweek in excess of the maximum workweek applicable to ~~such~~
14 that employee under subsection (a) of this section if ~~such~~ the
15 employee is employed pursuant to a bona fide individual contract,
16 or pursuant to an agreement made as a result of collective
17 bargaining by representatives of employees, if the duties of ~~such~~
18 the employee necessitate irregular hours of work, and the contract
19 or agreement: (1) Specifies a regular rate of pay of not less than
20 the minimum hourly rate provided in section two and compensation at
21 not less than one and one-half times ~~such~~ that rate for all hours
22 worked in excess of ~~such~~ a maximum workweek; and (2) provides a
23 weekly guaranty of pay for not more than sixty hours based on the
24 rates so specified.

1 (d) ~~No~~ An employer ~~shall be deemed to have violated~~ does not
2 violate subsection (a) of this section by employing any employee
3 for a workweek in excess of the maximum workweek applicable to ~~such~~
4 that employee under ~~such~~ that subsection if, pursuant to an
5 agreement or understanding arrived at between the employer and the
6 employee before performance of the work, the amount paid to the
7 employee for the number of hours worked by him or her in ~~such~~ that
8 workweek in excess of the maximum workweek applicable to ~~such~~ that
9 employee under ~~such~~ that subsection:

10 (1) In the case of an employee employed at piece rates, is
11 computed at piece rates not less than one and one-half times the
12 bona fide piece rates applicable to the same work when performed
13 during nonovertime hours;

14 (2) In the case of an employee performing two or more kinds of
15 work for which different hourly or piece rates have been
16 established, is computed at rates not less than one and one-half
17 times ~~such~~ those bona fide rates applicable to the same work when
18 performed during nonovertime hours; or

19 (3) Is computed at a rate not less than one and one-half times
20 the rate established by ~~such~~ agreement or understanding as the
21 basic rate to be used in computing overtime compensation
22 thereunder: *Provided*, That the rate so established shall be
23 authorized by ~~regulation~~ rule by the commissioner as being
24 substantially equivalent to the average hourly earnings of the

1 employee, exclusive of overtime premiums, in the particular work
2 over a representative period of time; and if: (i) The employee's
3 average hourly earnings for the workweek exclusive of payments
4 described in subdivisions (1) through (7) of subsection (b) of this
5 section are not less than the minimum hourly rate required by
6 applicable law; and (ii) extra overtime compensation is properly
7 computed and paid on other forms of additional pay required to be
8 included in computing the regular rate.

9 (e) Extra compensation paid as described in subdivisions (5),
10 (6) and (7) of subsection (b) of this section shall be creditable
11 toward overtime compensation payable pursuant to this section.

12 (f) (1) Employees of county and municipal governments may
13 receive, in accordance with this subsection and in lieu of overtime
14 compensation, compensatory time off at a rate not less than one and
15 one-half hours for each hour of employment for which overtime is
16 required pursuant to this section.

17 (2) County and municipal governments may provide compensatory
18 time under subdivision (1) of this subsection, only pursuant to a
19 written agreement arrived at between the employer and employee
20 before the performance of the work, and recorded in the employer's
21 record of hours worked, and if the employee has not accrued
22 compensatory time in excess of the limit prescribed in subdivision
23 (3) of this subsection. Any written agreement may be modified at
24 the request of either the employer or the employee, but under no

1 circumstances ~~shall~~ may changes in the agreement deny an employee
2 compensatory time heretofore acquired.

3 (3) An employee may accrue up to four hundred eighty hours of
4 compensatory time if the employee's work is a public safety
5 activity, an emergency response activity or a seasonal activity.
6 An employee engaged in other work for a county or municipal
7 government may accrue up to two hundred forty hours of compensatory
8 time. Any such employee who has accrued four hundred eighty or two
9 hundred forty hours of compensatory time, as the case may be, shall
10 for additional overtime hours of work, be paid overtime
11 compensation. If compensation is paid to an employee for accrued
12 compensatory time off, such compensation shall be paid at the
13 regular rate earned by the employee at the time the employee
14 receives such payment.

15 (4) An employee who has accrued compensatory time off
16 authorized to be provided under subdivision (1) of this subsection
17 shall, upon termination of employment, be paid for the unused
18 compensatory time at a rate of compensation not less than:

19 (A) The average regular rate received by such employee during
20 the last three years of the employee's employment; or

21 (B) The final regular rate received by ~~such~~ that employee,
22 whichever is higher.

23 (5) An employee of a county or municipal government:

24 (A) Who has accrued compensatory time off authorized to be

1 provided under subdivision (1) of this subsection; and

2 (B) Who has requested the use of ~~such~~ that compensatory time,
3 shall be permitted by the employee's employer to use ~~such~~ that time
4 within a reasonable time after making the request if the use of the
5 compensatory time does not unduly disrupt the operation of the
6 public agency. Compensatory time must be used within one year from
7 the time it was acquired.

8 (6) For purposes of this subsection the terms "compensatory
9 time" and "compensatory time off" mean hours during which an
10 employee is not working, which are not counted as hours worked
11 during the applicable workweek or other work period for purposes of
12 overtime compensation, and for which the employee is compensated at
13 the employee's regular rate.

NOTE: The purpose of this bill is to provide that an employee has the right to decline to work more than forty hours in a workweek.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.